Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Rules and Regulations	)	CC Docket No. 02-278
Implementing the Telephone	)	
Consumer Protection Act	)	
of 1991	)	
_____	)	

COMMENTS OF ROBERT BIGGERSTAFF ON THE PETITION FOR DECLARATORY RULING RELATING TO COMMISSION'S JURISDICTION OVER INTERSTATE FAX COMMUNICATIONS AND FOR OTHER PURPOSES

Robert Biggerstaff ("Commentor") hereby submits these comments as timely filed, urging denial of the Petition of The Fax Ban Coalition ("Petitioner") relating to the Commission's jurisdiction over interstate fax communications (DA 05-2975).

In addition, Commentor requests that these comments also be accepted as late-filed in the Commission's Request for Comments on the Sports Authority and Banks' Petitions (DA 05-1347, including DA 04-3185, DA 04-3187, DA 04-3835, DA 04-3836, DA 04-3837, and DA 05-342), the Commission's Request for Comments on the Alliance Contact Services, et al. Joint Petition (DA 05-1346), the Commission's Request for Comments on the Bolling Petition (DA 05-1348) and any other pending matters before the Commission pertaining to preemption of state laws regarding telemarketing, unsolicited faxes, or other marketing activities regulated by the Commission.

INTRODUCTION

As a preliminary matter, Petitioner's arguments contain a number of inaccuracies and flawed examples intended to create sympathy for petty thievery rather than presenting sound logic and legal reasoning. Petitioner's argument is based largely on two basic fallacies: 1) state laws applied to interstate faxes is a "new" idea and creates a heretofore unheard of encumbrance to advertisers and

2) that the silence of the TCPA's savings clause with respect to application of state laws to interstate faxes must be read as implied preemption. Both of these premises are false. The final leg of Petitioner's three legged stool is the assertion, without argument or legal foundation, that states lack the jurisdiction to regulate interstate faxes that are sent from or received in their state. While this idea has been parroted by many sources, there is no actual discussion of a legal basis for this concept, and for good reason – states clearly do have this authority.

1. Multi-state advertisers have always been subject to varying state advertising and business laws, and state fax laws are no different.

The most glaring misstatement by Petitioner is not even a legal argument, but a pervasive "theory" throughout the Petition that allowing state laws applying to interstate fax transmissions to stand would subject fax advertisers to "a riot of inconsistent and varying state regulations that makes it impossible for the Commission's TCPA rules to be effective." This ignores the fact that compliance with multiple states' advertising laws is already (and always has been) the case for multi-state advertisers who chose to direct their advertising into the forum state.[1] Mere fact that a single act may be subject to regulation by multiple states is not enough to invalidate the regulation.[2]

States have the power to protect their citizens from unscrupulous advertising practices.[3] Many states regulate advertising of products and services, including when those advertisements are sent into the state from another state, or another country. If an advertiser wants to compete for customers in a forum state, and directs its advertising into a forum state, the advertiser subjects itself

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1. Even the TCPA itself does this - by prohibiting telemarketing calls and faxes between 9:00 pm and 8:00 am local time, the telemarketer must know the timezone of the recipient of the call which is difficult in many instances.

2. Goldberg v. Sweet, 488 U.S. 252 (1989).

3. See, e.g., Thomas v. Collins, 323 U.S. 516, 545 (1945) (concurring opinion).

to the forum state's laws.[4]

In the TCPA "Congress thus preserved state police authority" to prosecute violations of "state civil or criminal laws of general applicability." Petitioner's admit this fact.[5] But if Petitioner's argument that state regulation of fax advertising must be preempted was correct, then no state advertising regulation could stand if an advertisement was delivered by interstate fax or telephone call. California's requirement that advertisements from mortgage brokers must contain their license number would also fall.[6] Florida's requirement that solicitations for travel must include the reseller of travel ID would fall.[7] Various state's regulations of sweepstakes advertisements would have to be preempted for sweepstakes advertisement sent by fax. What about an electronics vendor faxing ads for radar detectors in states where offing such devices for sale is illegal, or a legal software publisher advertising legal document preparation software where state laws require such ads to include disclaimers? State fax and telemarketing regulations are a tiny fraction of such laws.

Petitioner ignores the existence of these types of state regulations that already apply to interstate fax advertisements and which are complied with by advertisers every day. Petitioner claims that compliance with state fax laws "has little chance of succeeding." This tired old mantra has been parroted by the telemarketing industry for decades.... yet at the same time, trade publications are filled with services that offer compliance with all state laws.[8] Petitioner's example

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4. See, e.g., Electro-Craft Corp. v. Maxwell Electronics Corp., 417 F.2d 365, 368 (8th Cir. 1969) ("a nonresident seller subjects itself to the obligation of amenability to suit in return for the right to compete for sales in the [forum state's] market").

5. Pet. at 16.

6. Cal. Fin. Code § 22162

7. Fla. St. § 559.928.

8. See American Teleservices Association, New 2005 Online Regulatory Guide, http://ata.regulatoryguide.com/myeln/ata.asp (formerly the "American Telemarketing Association").

of sending faxes to an "800" number falls flat. First, sending junk faxes to an 800 number would violate the TCPA even if an EBR existed with the recipient.[9] Secondly, compliance with the TCPA's time of day requirements already requires the sender to know the location of the recipient and thus imposes different restrictions based on the location of the recipient (particularly during the period when some portions of some states use Daylight Savings Time and some do not).

Furthermore, it is already standard practice for a national advertiser to have to comply with all state's laws where it reasonably expects its advertising to reach.[10] But such an advertiser would not even be subject to the state law where an advertiser reasonable sought to avoid certain states, Due process protects such an advertiser if a fax reached that state via an 800 number or if the call was "forwarded" by the consumer. Since the sender would not have "purposefully directed" it into the state, and if the sender had no way to know the recipient was in California, California law would not apply.[11]

"A nonresident seller subjects itself to the obligation of amenability to suit in return for the right to compete for sales [in the forum state]." Electro-Craft Corp. v. Maxwell Electronics Corp., 417 F.2d 365, 368 (8th Cir. 1969). Electronic solicitations sent into the forum state is "doing business" in that state. See, Internet Doorway, Inc. v. Parks, 138 F.Supp.2d 773, 776 (S.D. Miss. 2001) (holding that an e-mail message sent into the state that attempted to solicit business satisfied the "doing business" prong of the Mississippi long-arm statute). If a state can not apply its consumer

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9. There is no EBR exemption for faxes sent to a cell phone or other number (like an 800 number) where the recipient is charged for the call.

10. Welkener v. Kirkwood Drug Store Co., 734 S.W.2d 233 (Mo. App. E.D. 1987) an out-of-state corporation was held subject to personal jurisdiction in Missouri because it "solicited purchases by sending out thousands of brochures and catalogs of its products throughout the United States, including Missouri." Id. at 239-40.

11. The courts have uniformly recognized that the proper test here would be if the forum state's long arm statute would apply and if that application would comport with the Due Process clause of the Constitution. If an advertiser could not reasonably know the fax would reach California, the California law could not be applied to that advertiser.

protection laws to an entity actually doing business in that state, then consumer protection at the state level is dead.

2. Common law torts.

California is simply regulating advertising conduct which constitutes a common law tort. State laws addressing specific tortious acts codify them into statutory torts.[12] Prior to the TCPA, at least one California court held that the recipient of an unsolicited fax has a cause of action under common law for trespass to chattels.[13] Petitioner would have the Commission deprive Californians of the protections of state law for acts of trespass, theft, and other offenses if that offense is committed with a telecommunications line.[14]

To demonstrate how absurd Petitioner's argument is, consider if California enacted a law that stated:

> It is unlawful for a person, if either the person or the recipient is located within California, to employ any method of delivery of any material advertising the commercial availability of any property, goods, or services, where the sending of that material results in any cost to the recipient or constitutes a tortious act. Any cost to the recipient shall include, but not be limited to 1) any monetary charge; 2) consumption of any portion of the recipient's consumable supplies.

Petitioner appears to take the position that such a law would be preempted if the advertisement violating this provision were sent over an interstate telephone line (i.e. a fax advertisement) but would not be preempted if the *exact same advertisement* were sent in interstate mail, postage due.

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12. See, e.g., Labine v. Vincent, 401 U.S. 532, 535 (1971) (With statute providing for cause of action, Louisiana "created a statutory tort ... so that a large class of persons injured by the tort could recover damages in compensation for their injury.")

13. See Fax Weighed, 22 Cents Won in 'Junk Mail' Suit, L.A. Times, July 4, 1991, at 4.

14. Such causes of action arising out of interstate electronic communications have been sustained. Compuserve v. Cyber Promotions, Inc., 962 F.Supp. 1015 (S.D. Ohio 1997); AOL v. IMS, 24 F.Supp. 2d 548 (E.D. Va. 1998); Hotmail Corp. v. Van$ Moneypie, Inc., 47 U.S. P.Q. 2d 1020 (N.D. Cal. 1998); eBay, Inc. v. Bidder's Edge, 1000 F.Supp. 2d 1058 (N.D. Cal 2000).

Or consider a less specific situation where a state law prohibits "employment of any method of competition that has been declared to be unfair, deceptive, or tortious" and in that state, the sending junk fax solicitations to any recipient in that state, has been declared to be both "unfair" and "tortious" and does not include an exemption for a junk fax sent within an "established business relationship."[15]

Also consider cases like Fallang v. Hickey, 40 Ohio St.3d 106 (1988) where the Ohio Supreme court held that mailing a letter from South Carolina to Ohio subjected sender to personal jurisdiction in Ohio for a tort action in Ohio under Ohio law arising out of the contents of the letter. Petitioner would have the Ohio action preempted if letter been an advertisement sent by fax instead of mail.

3. What differentiates a "general" cause of action arising out of state police power which can apply to interstate faxes, and what does not?

Petitioner concedes that "general" causes of action created under state police powers are not preempted. However Petitioner appears to argue that while those "general" causes of action are not preempted, a more "specific" cause of action targeting fax advertisements *would* be preempted.[16] Such a distinction makes no sense.... it elevates form over substance. If California had a general "cost shifted advertising" statute which would make junk faxes and postage-due junk mail sent into California illegal, and this cost-shifted advertising statute is a general law and clearly would not be preempted, how can a more specific statute that prohibits the exact same junk fax for the exact same

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15. This is similar to the law in the state of Ohio where once an act has been declared by an Ohio court to be unfair or deceptive and the entry that contains that declaration is placed in the Attorney General Public Inspection File ("PIF") anyone who engaged in that act in the future is liable for treble actual damages or statutory minimum damages. The Ohio PIF files contain several cases declaring that sending a junk fax advertisement without consent is such a violation, and no established business relationship exemption exists to that violation.

16. This appears to be the argument Petitioner impliedly makes, since they acknowledge that "Congress thus preserved state police authority" to prosecute violations of "state civil or criminal laws of general applicability." Pet. at 16.

reason be preempted? An out-of-state faxer must comply just the same.

4. State regulation of conduct and not infrastructure.

What this example illustrates is the distinction between a state's regulation of the interstate communications *infrastructure* (which is generally[17] not allowed and the Commission can preempt) versus regulation of interstate *conduct* which harms citizens of the state from outside its borders. Such "long distance torts" are common and states frequently proscribe such conduct with the courts finding that the application of the forum state's laws to the out-of-state actor comports to due process.[18] Regulation by the Commission of tortious advertising harms caused to the recipient, is much less attenuated to the national communications system than the regulation of common carriers, services, and the telecommunications infrastructure which is the bailiwick of the Commission.

State laws regarding solicitations delivered by interstate fax are not regulations of the interstate telecommunications infrastructure. They are regulations of interstate unauthorized misappropriation of the recipient's paper and toner without permission. They are a regulation of nonconsensual theft, trespass, and conversion that is the duty of the state authorities to proscribe in a way consistent with expectations of the citizens of that state. As Justice Jackson put it:

> "The modern state owes and attempts to perform a duty to protect the public from those who seek for one purpose or another to obtain its money. When one does so through the practice of a calling, the state may have an interest in shielding the public against the untrustworthy, the incompetent, or the irresponsible, or against unauthorized representation of agency."[19]

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17. States do regulate the *use* of the portion of the interstate infrastructure within their borders. For instance, a partial telemarketing ban applying to both interstate and intrastate calls, has been implemented by Louisiana in response to emergencies such as Hurricane Ivan in 2004, Tropical Storm Cindy in 2005, and Hurricane Katrina in 2005. In that state, the law permits the government to temporarily suspend telemarketing operations in areas where a state of emergency exists. This is a state law *specifically* dealing with telemarketing which if the Commission rules that state laws specific to telemarketing are preempted, will *have* to be preempted.

18. Fulton v. Chicago, Rock Island & P. R. Co., 481 F.2d 326 (8th Cir. 1973) cert. denied 94 S.Ct. 540, 414 U.S. 1040, 38 L.Ed.2d 330.

19. Thomas v. Collins, 323 U.S. 516, 545 (1945) (concurring opinion).

5. The JFPA does not blanketly "permit" faxes.

Petitioner also claims that the Junk Fax Prevention Act of 2005 ("JFPA") "permits" interstate junk faxes sent within an EBR. This is a gross overstatement. Pet. at 18. The JFPA allows for a limited exemption from the prohibition in the TCPA for such faxes. It does not "permit" them and it has no relevance outside the TCPA. This is an important distinction because Petitioner's argument is based on the false premise that Congress intended to blanketly "permit" such faxes in the face of state laws (or other federal laws) that otherwise prohibit them. Petitioner does not dispute that the intrastate application of the California law is valid. And there is no contention that other federal statutes would be blocked, such as security laws if the fax promoted a stock investment. There is similarly no contention by Petitioner that a state cause of action for trespass or conversion could not be brought for an interstate junk fax sent within an EBR. So it is clear that Congress intended ***not*** to blanketly permit such interstate faxes, but only to create an exemption *to the TCPA* and to the TCPA alone, with other laws left in place.

6. The TCPA is a floor, not a ceiling.

The Commission acknowledges that the TCPA creates a "floor" upon which states can pass more restrictive rules.[20] This uniform floor satisfies Congressional goals. "[T]he *minimum* requirements for compliance are therefore uniform throughout the nation."¶ 81 (emphasis added). Like many other statutes, Congress established a floor on which states can build greater protections if they see fit. This type of savings of more restrictive state statutes is common. See, e.g., 28 U.S.C. § 2009 (employer polygraphs); 42 U.S.C. § 11115 (physician reviews); 20 U.S.C. § 6084 (education standards).

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20. TCPA Order, ¶ 81.

Petitioner displays some crafty editing to imply *Congress* stated the purpose of the TCPA was "to both relieve states of a portion of their regulatory burden and protect legitimate telemarketers from having to meet multiple legal standards."[21] However, the full quotation in context is:

> According to the ***Direct Marketing Association***, there are 43,000 bills touching on the practice of direct marketing pending before state legislatures. Of these, 475 bills are related to privacy. There are 18 bills that would establish do-not-call lists. Under the circumstances, a substantive ***argument can be made*** that federal legislation is needed to both relieve states of a portion of their regulatory burden and protect legitimate telemarketers from having to meet multiple legal standards.[22]

Merely "recognizing an argument can be made" does not imply that the argument either is meritorious or holds water in the face of other more important considerations.

While the Petition makes various references to one senator's offhand comment about "uniform legislation to protect consumers" this does not imply that state laws should be preempted.[23] In the very next sentence after making this remark, Senator Pressler states "This bill will not preempt any State law addressing this topic." In addition, there is no basis to infer that this "uniformity" must come in the form of a ceiling, and not a floor. Indeed, since Congress expressly contemplated and approved of more restrictive intrastate state telemarketing and junk fax laws and was silent on interstate applicatiton of those state laws, any implication that a uniform "ceiling" was contemplated is clearly wrong.

Even if the a floor statement of a senator were taken as an indication of intent to create a ceiling, that intent did not make it into the enacted text of the TCPA. "When the legislative history stands by itself, as a naked expression of 'intent' unconnected to any enacted text, it has no more

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21. Petition at 3, citing H. R. Rep. No. 102-317 (1991).

22. H. R. Rep. No. 102-317 (1991) (emphasis added).

23. 137 Cong.Rec. S8953 (comments of Sen. Pressler, introducing S. 1410).

force than an opinion poll of legislators--less, really, as it speaks for fewer."[24]

7. Preemption

a. No inference of preemption can be attributed to silence in the savings clause.

Preemption of state law is a derogation of state sovereignty. It tilts the balance between the state and federal sovereigns. While our system of federalism does permit the federal government this ability, it is not to be presumed.

It is a "longstanding rule that we will not infer pre-emption of the States' historic police powers absent a clear statement of intent by Congress."[25] We must not construe a statute to alter any delicate constitutional balances without a "clear statement" to do so. As Justice O'Connor noted, this requirement "is not a mere canon of statutory interpretation. Instead, it derives from the Constitution itself."[26]

Petitioner believes that the TCPA's express saving of state laws applied to intrastate faxes should *imply* Congress intended preemption of state laws applied to interstate faxes. This is incorrect. The fact that some state laws are saved and Congress is silent as to other state laws, means that those other state laws are not automatically preempted, but instead are subject to normal preemption analysis.[27] Is essence, Petitioner argues that "failure to save means preemption" and

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24. Brill v. Countrywide Home Loans, Inc., --- F.3d ---, 2005 TCPA Rep. 1389, 2005 WL 2665602 (7th Cir. Oct. 20, 2005).

25. Gade v. National Solid Wastes Mgmt. Ass'n, 505 US 88, 111-12 (1992) (Justice Kennedy, concurring in part and concurring in the judgment) citing Rice v. Santa Fe Elevator Corp., 331 US 218, 230 (1947); Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977); English v. General Electric Co., 496 U.S. 72, 79 (1990); Fort Halifax Packing Co., Inc. v. Coyne., 482 U.S. 1, 21 (1987).

26. Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197, 209 (1991) (O'Connor, Scalia, JJ., dissenting).

27. This is also the apparent reason the Commission noted the preemption issue is "ambiguous." At first blush, Petitioner's argument seems to be a possible interpretation of the savings clause in the TCPA, but application of sound logic shows to Petitioner's interpretation is not legitimate, as the TCPA savings clause merely prevents field preemption, and does not actually imply preemption of any state laws.

Congress was silent and thus failed to save state laws applied to interstate faxes.[28] But Congress was also silent on preemption with respect to state fax laws that are identical to the TCPA. To accept Petitioner's argument that silence implies express[29] preemption, it would also mean that even intrastate fax laws that are not "more restrictive" than the TCPA (i.e. identical to the TCPA) would also be mandatorily preempted so a state law that is identical to the TCPA would be compelled by Petitioner's logic to be preempted.

This is, of course, not the case. The Commission recognized that the TCPA "is silent on the issue of whether state law that imposes more restrictive regulations on interstate telemarketing calls may be preempted."[30] Silence does not mean preemption. The correct construction of the silence with respect to certain state laws is that conventional conflict preemption analysis should be applied, and not field preemption.[31]

Consider if the TCPA contained no savings clause at all. Petitioner would argue that with the TCPA, Congress intended to "occupy the field" thereby invoking field preemption of telemarketing and junk fax regulation. It was necessary for Congress to make expressly clear that it did not intend for field preemption to be applied. That is what the savings clause does.

Because Congress showed clear intent for field preemption not to be invoked, we must consider the remaining preemption vehicles – express preemption and conflict preemption.

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28. Petitioner cites Metrophones Telecomms., Inc. Global Crossing Telecomms., Inc., 423 F.3d 1056, 1072 (9th Cir. 2005) for their proposition. However, Metrophones presented a situation opposite from the TCPA, where Congress expressly preempted certain state laws, and the court found it implied that other state laws were, rebutably, not preempted. The conclusion that "express pre-emption implies non-preemption of other state laws" is supported by the "longstanding rule that we will not infer pre-emption of the [s]tates' historic police powers absent a clear statement of intent by Congress." Gade v. National Solid Wastes Mgmt. Ass'n, 505 US at 111-12 (1992) This rule instructs us that silence – in either a preemption clause or in a savings clause – implies non-preemption.

29. How "express" preemption can be "implied" by silence is yet another Kafkaesque argument of Petitioner.

30. TCPA Order, ¶ 82.

31. See, e.g., Van Bergen v. State of Minn., 59 F.3d 1541, 1547-1548 (8th Cir. 1995).

Obviously Congress did not invoke express preemption in the TCPA. With respect to conflict preemption, Congress stated that state laws that are in conflict with the TCPA would fall into two categories: those that are "more restrictive" than the TCPA, and those not "more restrictive" than the TCPA.[32] No one disputed that "more restrictive" intrastate state laws are saved. Less restrictive state laws[33] and state laws applied to interstate faxes (both those state laws that are "more restrictive" and those not "more restrictive") would be subject to conflict preemption. Not field preemption, not express preemption, but only conflict preemption.

b. Conflict preemption requires individual inquiry into each state law allegedly in conflict and a determination that actual conflict exists.

The Commission believed that "more restrictive state efforts to regulate interstate calling would almost certainly conflict with our rules." ¶82. However, this is not the end of the analysis, because mere conflict is not enough to subject the state law to preemption. There must be a significant enough conflict to warrant preemption and that conflict must be real and not hypothetical. A "hypothetical conflict is not a sufficient basis for preemption."[34] The necessity of individual inquiry is illustrated by Petitioner's complaint about the practical impossibility of complying even with simple requirements that disclosures on faxes must be of a sufficient type size to be read.[35]

Conflict preemption depends on the specifics of the state law. Of the cases that have addressed alleged conflicts between the TCPA and state laws, none have determined that the state law in question was preempted by the TCPA.[36] In each case, this required an individual analysis of

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32. Except for the "Technical and procedural standards" of identification of the fax sender. They are subject to conflict preemption regardless of whether they are more restrictive than the TCPA or not.

33. State laws that are identical to the TCPA would fall in the category of not "more restrictive."

34. Total TV v. Palmer Comm., Inc., 69 F.3d 298, 304(9th Cir. 1995).

35. Petition, at 19-20.

36. E.g., Van Bergen v. Minnesota, 59 F.3d 1541, 1995 TCPA Rep. 1235 (8th Cir.1995).

the state law and its interpretation. A state court, with its superior expertise in construction of state laws,[37] may adopt an interpretation of the state law that prevents it from being struck down. Such an individual inquiry should be left to the state courts to resolve. Petitioner can easily bring an action in state court to answer such questions.

c. What is "more restrictive" and "less restrictive"?

To illustrate the need for individual inquiry in the specific provisions of state law alleged to conflict with the TCPA, are the following examples "more restrictive" or "less restrictive" than the TCPA:

- Telephone solicitations shall not be made after 10:00 pm or before 10:00 am local time. (Cutoff is later than the TCPA, but early morning calls that the TCPA does not prohibit are prohibited).

- A private right of action for $100,000 for each violation when the statute is identical to the TCPA. (Identical restrictions, but a larger provision for larger damages).

- A state law that is identical to the TCPA, but has a longer (or shorter) statute of limitations? (The 4-year statute of limitations in 28 USC § 1658 applies to TCPA claims).[38]

- A state law that is identical to the TCPA, but includes recovery of attorney fees.

8. States do have the jurisdiction to regulate interstate faxes

Petitioner cites repeatedly to statements stating that states cannot regulate interstate calls.

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37. Recognizing this, federal courts adjudicating state law claims often certify the state law questions to the state court to resolve.

38. Zelma v. Konikow, 879 A.2d 1185 (N.J. App. 2005); Little v. Brinker Missouri, Inc., 2005 TCPA Rep. 1421 (Mo. Cir. Dec. 7, 2005).

This is mere *ipse dixit*.[39] There is no caselaw or even legal theory cited backing up this supposition.[40] Nor is there any discussion of this (flawed) premise being extended to prohibit any state regulation of "conduct taking place using an interstate call." In fact, there is ample caselaw holding just the opposite.[41] In reality, the TCPA itself recognizes that state laws of general applicability can and are expected to apply to interstate faxes and phone calls. Even state laws that are specifically intended to cover conduct in wire communications are properly applied to both intrastate and interstate communications.[42]

Even within the same page, petitioner's arguments are contradictory. On one hand, they claim the TCPA was enacted to "protect legitimate telemarketers from having to meet multiple legal standards" but in the same breath, claim "states lack jurisdiction to regulate interstate communications." If states lacked jurisdiction to enforce their own laws on interstate fax advertisements, then what did those fax marketers need protection from? For a perspective from an analogous advertising medium (e-mail), if states lacked jurisdiction to enforce their own laws on interstate *e-mail* advertisements (delivered over the Internet, a communication service which the

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39. Petitioner cites to various statements of Congress, but not to any legal analysis or independent conclusion reached by a court that this is in fact the case.

40. Although some courts in early TCPA cases included this statement from the legislative history in dicta, it was not part of the holding of any such case. Some have suggested that state laws in this regard violate the Commerce Clause or other constitutional provisions. However, the courts have rejected such claims. See State v. Heckel, 24 P.3d 104 (Wash. 2001), cert. denied 534 U.S. 197 (2001) (state junk e-mail law applied to interstate e-mail).

41. See, e.g., People ex rel. Spitzer v. Telehublink Corp., 756 N.Y.S.2d 285 (N.Y. App. 2003) (reviewing New York state law action against a Delaware corporation that sold a discount benefits package to customers throughout the United States by telephone calls from Montreal); Commonwealth v. Events Int'l, Inc., 585 A.2d 1146, 1148, 1151 (Pa. Commw. Ct. 1991) (ordering defendants to answer Pennsylvania Attorney General state consumer fraud action alleging that company telephoned Pennsylvania consumers from Florida to solicit them); Cody v. Ward, 954 F. Supp. 43, 44 (D. Conn. 1997) ("a nonresident's transmission of fraudulent misrepresentations to a Connecticut resident by telephone and electronic mail for the purpose of inducing him to buy and hold securities renders the nonresident subject to suit in Connecticut in an action based on the misrepresentations.")

42. See State v. Heckel, 24 P.3d 104 (Wash. 2001), cert. denied 534 U.S. 197 (2001) (state e-mail law applied to interstate e-mail).

Commission has jurisdiction), then why did Congress expressly preempt certain classes of state e-mail laws in the CAN-SPAM Act?[43]

Petitioner cites Lousiana PSC v. FCC, 476 U.S. 355, 260 (1986) for the proposition the 1934 Communications Act "divide[d] the world [] into two hemispheres - one comprised of interstate service, over which the FCC would have plenary authority, and the other made up of intrastate service, over which the States would retain exclusive jurisdiction." However, the actual quotation from the Court is quite different:

> However, while the [1934 Communications] Act would ***seem*** to divide the world of domestic telephone service neatly into two hemispheres - one comprised of interstate service, over which the FCC would have plenary authority, and the other made up of intrastate service, over which the States would retain exclusive jurisdiction - in practice, ***the realities of technology and economics belie such a clean parceling of responsibility***.

Id. (Emphasis added). But even if Petitioner's attempted misdirection were taken as the actual statement of the Court, it states that there is a division between interstate and intrastate ***service***, not a division of tortious acts taking place ***using*** that service. If the contrary were true, no state harassment or stalking law could stand when applied to an interstate call. Quill Corp. v. Heitkamp, 504 U.S. 298 (1992) is not to the contrary, as it recognized that a physical presence is not necessary to subject a seller to the laws of the forum state where it directs its sales, and subjecting out-of-state mail order merchant Quill to North Dakota state law was permissible.[44]

9. The source of authority to preempt state laws regarding junk faxes is limited.

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43. In fact, the CAN-SPAM Act of 2003 (Public Law 108-187) amended the TCPA. With 12 years of parallel TCPA and state telemarketing regulations already experienced, obviously Congress could have amended the preemption clause of the TCPA if in that 12 years Congress saw any actions by states that needed preempting. Congress did not do so.

44. Quill ultimately did not have to collect sales taxes because the tax sought to be imposed by the state was unconstitutional as applied to Quill. "[W]hile a State may, consistent with the Due Process Clause, have the authority to tax a particular taxpayer, imposition of the tax may nonetheless violate the Commerce Clause."

It is black letter law that absent statutory authorization, an agency can not summarily preempt state laws:

> "[A] federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority. This is true for at least two reasons. First, an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency."

Louisiana PSC, 476 U.S., at 374. But this is not a question just about preemption – as other commentors have noted it is a question of *jurisdiction*. The petition itself repeatedly refers to a lack of jurisdiction for states to apply their laws to interstate faxes. While the Commission can act to adjudge *preemption* of state laws in certain circumstances, and plays a role in interpreting federal statutes, the Commission is not empowered to determine the *jurisdiction* of a sovereign state's laws or to determine the *interpretation* of a sovereign state's laws. That is the sole province of the courts. So where does the Commission purport to be given authority to preempt state telemarketing and fax laws? This must necessarily come from the TCPA itself, or from the general authority of Section 151.

Various portions of the Communications Act give the Commission authority to preempt state laws in specific subject areas. E.g., Cable Act, 47 U.S.C. § 521; Provision of Payphone Service, 47 U.S.C. § 276. These sections set forth specific criteria the Commission is to consider in its administration of that section. Some of these authorize the Commission to consider economic impacts. For example in the Cable Act, Congress directed the Commission to enact regulations to "minimize unnecessary regulation that would impose an undue economic burden on cable systems."

47 U.S.C. 521(1), (6) (1982). Congress did not authorize such a consideration in the TCPA. [45] Assuming, *arguendo*, that the TCPA gives the Commission the ability to preempt some state laws, what are the criteria for the Commission to consider in making this determination?

Petitioner's argument rests in large part on the costs of compliance to telemarketers and junk faxers, but the TCPA does not mention economic analysis of this type. Indeed, the only mention of anything related to economics in the TCPA is in the findings, and those all regarded the impact to the *recipients* of unwanted faxes, and not to the fax advertisers.[46] This is the purpose of the TCPA *actually stated in the bill*, and must be paramount over unstated goals purported to be supported only by a snippit of an out-of-context statement of an individual legislator.[47] Congress did not include an "economic impact" clause in the TCPA or in other portion of the Communications Act giving the FCC power to preempt state telemarketing regulation, while it did so in parts of the Communications Act regarding other topics[48] and even in the TCPA and JFPA.[49] Since the TCPA itself does not

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45. Congress did make that analysis part of the consideration with respect to a potential exemption for small businesses from having to establish a toll-free method for the opt-out provisions of the JFPA and the cost to small businesses of a time limit on the duration of the EBR. Those are not implicated in the instant question

46. See, also, H. R. Rep. No. 102-317 (1991). "The rulemaking must consider the cost borne *by recipients*, and the most cost effective methods of preventing facsimile advertising abuses. The Committee found that when an advertiser sends marketing material to a potential customer through regular mail, the recipient pays nothing to receive the letter. In the case of fax advertisements, however, the recipient assumes both the cost associated with the use of the facsimile machine and, the cost of the expensive paper used to print out facsimile messages. It is important to note that these costs are borne *by the recipient* of the fax advertisement regardless of their interest in the product or service being advertised. In addition to the costs associated with fax advertisements, when a facsimile machine is receiving a fax, it may require several minutes or more to process and print the advertisement. During that time, the fax machine is unable to process actual business communications. Only the most sophisticated and expensive facsimile machines can process and print more than one message at a time. Since businesses have begun to express concern about the interference, interruptions *and expense* that junk fax have placed upon them, states are taking action to eliminate these telemarketing practices."

47. Divining congressional intent from a short soliloquy of legislative history is always an exercise fraught with peril. Some jurists, particularly Justice Scalia, eschew reliance on legislative history as "the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends." Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in judgment).

48. E.g., 47 U.S.C. 521(1), (6) (1982).

49. See note 45, supra.

authorize the Commission to consider economic impact of junk faxers, and the legislative history explicitly refers to the costs born by recipients instead, we turn to the general authority of Section 151:

> "For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, ... a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications,..."

Unlike the Cable Act which specifically instructs the Commission to protect economic interests of cable providers, section 151 lays out a finite list of relevant considerations the Commission is to consider in its general grant of authority. None of these include the economic interests of junk faxers. Indeed, Congress and the FCC found that junk faxes are an impediment to the rapid, efficient, Nation-wide, and world-wide wire and radio communication service by interfering with that infrastructure. Junk faxes trespass on and consume property. To preempt state laws protecting property and protecting fax machines from being tied up with unwanted missives, would be contra to the mandate of section 151 and contrary to the findings in the TCPA itself. Thus the Commission can not base preemption of state laws regulating junk faxes on the general grant of authority in section 151 or on the TCPA itself. To the extent that the Commission were to base its preemption, even partially, on economic impact to junk faxers and telemarketers, such a reliance would render the Commission's preemption invalid.

Lousiana PUC is very instructive here. In that case, the Commission tried to rely on Section 220 for the authority to preempt state regulations regarding depreciation schedules for telephone companies. But that statute did not give the Commission that authority. When this argument didn't work, the Commission fell back to an alternative and independent ground, reasoning that the FCC

is entitled to pre-empt inconsistent state regulation which "frustrates federal policy." 476 U.S. 355, 368. This argument was based on the general grant of Section 151. Id. In response, the Court limited the ability of the Commission's ability to preempt state laws to the strict criteria of Section 151.

While interstate faxes are certainly within the ambit of the Interstate Commerce Clause and *Congress* could preempt or give the Commission the authority to preempt state regulation of such state laws in some instances, the *Commission* can not do so without statutory authorization from Congress. The TCPA together with the general authorizations of Section 151, and the specific criteria of those authorizations, and the repeatedly stated concerns for the costs of junk faxes to the recipient, all militate against preemption of state laws regarding junk faxes. The ability of states to regulate unwanted trespassory advertising from injuring that state's citizens, (where that regulation is consistent with Constitutional freedoms)[50] is not something the Commission has been granted jurisdiction to preempt.

Nor can the Commission get its authority from the mere fact that the TCPA is a "specifically targeted" regulation of the subject matter and summarily preempt all state regulation on that subject matter. Id., 476 U.S. at 376-77, (rejecting the Commission's argument that because section 220 deals specifically and expressly with depreciation, automatic preemption of all state regulation regarding depreciation is preempted). "Thus, we simply cannot accept an argument that the FCC may nevertheless take action which it thinks will best effectuate a federal policy. An agency may not confer power upon itself." Id., 476 U.S. at 374.

10. The true character of many junk fax solicitations is actually intrastate.

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50. The Commission is not empowered to adjudge a state law's constitutionality. That is the sole province of the courts.

Even if the Commission were inclined to find preemption of more restrictive state laws applied to interstate faxes and telemarketing calls, the fact is many junk faxes and telemarketing calls are solicitations between a business and a consumer in the same state, even thought the *path* of those solicitations used interstate telephone lines.

For example, Wal*Mart is a national corporation with a physical presence in California and many other states. Wal*Mart has also been known to indiscriminately blast junk faxes to unsuspecting victims.[51] If Wal*Mart sends a fax advertising Wal*Mart to a California fax machine, that is clearly a solicitation from Wal*Mart (an entity doing business in California) and a California consumer, even if Wal*Mart hires a junk fax broadcaster in Florida to actually send the fax. This scenario is in fact the solicitation of a Californian by a company doing business in California.[52]

If the Commission were to take a position that state laws that are specific to junk faxes and telemarketing can be preempted by the Commission when applied to interstate calls, the Commission should recognize an important distinction, Where a company is doing business in the forum state, an advertisement sent to a recipient in that forum state on behalf of that company is in reality a genre of solicitations that states should be given great latitude to regulate, even if the company doing business in the state used a fax transmitter outside the forum state to send the fax back into the forum state on the company's behalf.

This common sense distinction recognizes a traditional and legitimate area of state regulation which only applies the state law to a marketer who is actually doing business in the state where the

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51. Lipscomb v. Wal-Mart Stores, Inc., 2003 TCPA Rep. 1183 (S.C.C.P. June 26, 2003) (order granting class certification).

52. It is widely accepted that the law governing a transaction between a buyer and seller in the same state typically will be the law of that state (unless the parties agree to apply the law of another jurisdiction and that jurisdiction has a reasonable relationship to the transaction.) See, e.g., 15A C.J.S. Conflict of Laws §§ 11(4)a,b. The same principal logically applies to the proposing of the transaction (advertising).

faxes are sent.[53] Limiting the Commission's preemption in this way not only benefits consumers, but comports to the court decisions pointing out the Commission's obligation to narrowly tailor its preemption of state regulation.[54] States will have different experiences and perspectives that may lead them to adopt safeguards that are at variance with federal minimum standards. These differences should be accommodated wherever possible.[55] Preemption of state regulation in this area should be as narrow as possible to accommodate differing state needs.[56]

This also offers comity between governing entities. In effect, while the Commission has jurisdiction in a given area, it can decline to completely assert its authority in the interest of comity. The Commission has deferred to state regulations in numerous areas. For example, the Commission has declined to require federal tariffing of certain LEC-provided services, such as Centrex or call waiting, even though these services can be used in conjunction with both interstate and intrastate communications.[57] Similarly, the Commission has declined to assert authority over private line

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53. Anticipating an objection from a business that with a fax to some fax numbers (like an 800 number) is impossible to know the state to which it is being sent, it is widely accepted that the forum state law could not be applied to such a fax under Due Process absent the ability of the faxer to reasonable know what state it is being sent to.

54. NARUC v. FCC, 880 F.2d 422, 429-430 (D.C. Cir. 1989). The Commission has an obligation to limit preemption to those state regulations that could not feasibly coexist with federal regulations. California v. FCC, 905 F.2d 1217, 1244-45 (9th Cir. 1990).

55. A reasonable approach would be to preempt state laws in this area where compliance with both state law and federal law would be impossible. But where compliance with both laws is reasonablely achievable, the state laws should not be preempted.

56. For example, the laws of Minnesota, New Mexico, and Rhode Island specify a minimum type size for opt-out notices on faxes. Compliance with such laws is trivial even for a multistate advertiser, particularly since no state mandates a smaller type size, so an advertiser who did not wish to make a specific fax for those states can use the same sufficient type size on all opt-out notices.

57. See In re Filing and Review of the Open Network Architecture Plans, Memorandum Opinion and Order, 4 FCC Rcd. 1, para. 85 n.156 (1988) (noting that services such as "call forwarding and call waiting often are tariffed with states," but that the FCC had jurisdiction to apply federal ONA requirements to them); Illinois Bell Tel. Co. v. FCC, 883 F.2d 104, 114 (D.C. Cir. 1989) (noting that, while the costs of Centrex service are recovered through local tariffs, "this regulatory accounting treatment does not negate the mixed interstate-intrastate character" of the service).

networks on which less than 10 percent of the traffic is jurisdictionally interstate.[58]

As pointed out supra, if a state can not apply its constitutionally valid consumer protection laws to the solicitations of an entity actually doing business in that state merely because an interstate telephone line is used to make the solicitation, then consumer protection at the state level is dead.

CONCLUSION

Petitioner's arguments are based on out of context quotations and unsupported premises. They are flawed and not persuasive. Consideration of "economic impact" on faxers is not a permissible basis to act, since the statute itself states the opposite -- the negative economic impact to the *recipients* is the purpose of the statute. Even if the Commission found preemption was permissible, regulation of advertising sent to a consumer in the forum state by a company also doing business in the same state, is the appropriate province of state regulation and the Commission should refrain from preempting state laws in this area unless compliance with both laws would be impossible. Finally, the actual determination of conflict or dual compliance impossibility should be left in the first place to the necessary individual inquiry of state courts to interpret the state law. For the foregoing reasons, the Petition should be DENIED.

Respectfully submitted, this the 21st day if December 2005.

/s/
Robert Biggerstaff

58. See In re MTS and WATS Mkt. Structure, Decision and Order, 4 FCC Rcd. 5660 (1989)